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8 **BEFORE THE PUBLIC DISCLOSURE COMMISSION**  
9 **OF THE STATE OF WASHINGTON**

10  
11 In the Matter of Enforcement Action  
12 Against

13 Dr. Marilou Rickert,

14 Respondent.

NO. 03-147

**DR. RICKERT'S REPLY BRIEF**

15 **INTRODUCTION**

16 Dr. Marilou Rickert files this Reply Brief in Opposition to the Public Disclosure  
17 Commission Staff ("Staff") Response, and requests that the charge against her be dismissed. Dr.  
18 Rickert previously detailed the pertinent facts, and in the interest of brevity, will not detail them  
19 again here.

20 **RCW 42.17.530 VIOLATES THE FIRST AMENDMENT**

21 Dr. Rickert previously objected to enforcement of RCW 42.17.530 (the "Statute") on the  
22 basis that the Statute violates the First Amendment to the United States Constitution. See  
23 generally, State v. Vote No! Committee, 135 Wash.2d 618 (1998); Response of Marilou  
24 Rickert, pp. 6-15. Dr. Rickert argued that the Statute fails the tests set forth by both Washington  
25 Supreme Court and relevant United States Supreme Court precedent. The Public Disclosure  
26 Commission ("Commission") advised that it lacked authority to consider Dr. Rickert's First  
27 Amendment objections. See Prehearing Order (June 2, 2003). Consequently, Dr. Rickert will  
28 not detail here her arguments that the Statute violates her First Amendment rights. However, Dr.

**DR. RICKERT'S REPLY**  
**No. 03-147 - Page 1**

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1 Rickert once again renews her First Amendment objections to the Statute in order to preserve  
2 those objections for appellate review.

### 3 THE EVIDENCE FAILS TO ESTABLISH A VIOLATION OF THE STATUTE

4 As a threshold matter, Dr. Rickert notes that the Statute requires proof by "clear and  
5 convincing evidence," a higher burden than would otherwise be applicable in an ordinary  
6 defamation or false advertising action. A violation requires proof by clear and convincing  
7 evidence of: (1) actual malice, (2) falsity, and (3) materiality. RCW § 42.17.530. The Staff  
8 cannot fulfil any one of those elements with respect to Dr. Rickert's statement (the "Statement")  
9 that Senator Sheldon:

10 "voted to close a facility for the developmentally challenged in his district."

11 Dr. Rickert addresses the failure of each element in turn.

#### 12 1. Actual Malice.

13 One recent case defines a statement made with actual malice as a:

14 statement made with knowledge of its falsity or with reckless disregard of whether  
15 it is false or not. **Reckless disregard [] requires the plaintiff to prove that the  
16 speaker acted with a high degree of awareness of the statement's probable  
17 falsity or in fact entertained serious doubts as to its truth. A plaintiff cannot  
18 show actual malice by merely showing that a defendant unreasonably failed  
19 to investigate the truth of a statement.**

20 Doe v. Gonzaga University, 143 Wn.2d 687 (2001), rev'd on unrelated grounds, 536 U.S. 273  
21 (2002) (emphasis added); see also Herron v. King Broadcasting Co., 112 Wn.2d 762, 776 (1989)  
22 ("Failure to investigate is not sufficient to prove recklessness."). Dr. Rickert lacked actual  
23 malice, and the Staff fails to put forth any evidence—much less clear and convincing evidence—  
24 showing that she harbored actual malice. See Notice of Administrative Charges, May 5<sup>th</sup>, 2003;  
25 Report of Investigation, April 29, 2003. The undisputed evidence shows the following:

- 26 (1) Dr. Rickert did not know the Statement was false;
- 27 (2) Dr. Rickert did not harbor any doubts as to the Statement's veracity;
- 28 (3) Dr. Rickert reasonably relied on the representations of an experienced and  
respected lobbyist, Dave Wood;
- (4) Dr. Rickert knew Dave Wood's reputation as being an upstanding  
lobbyist; and
- (5) Dr. Rickert knew the reputation of Senator Sheldon as someone who  
generally does not favor the rights and interests of developmentally  
challenged persons.

1 Consequently, it seemed plausible, if not likely, that Senator Sheldon voted to close the facility.  
2 Dr. Rickert's belief in this regard is reasonable (which is a greater showing than is necessary in  
3 the present case). Indeed, Senator Sheldon voted to close a similar facility immediately  
4 following the election. Finally, given the constraints, size and nature of her campaign, requiring  
5 Dr. Rickert to conduct additional factual investigation would be unreasonable.

6 2. Falsity.

7 The Staff argues that two components of Dr. Rickert's statement lacked veracity:

8 (1) Mission Creek Youth Camp (the "Facility") is not a facility for the developmentally  
9 challenged, and (2) Senator Sheldon did not actually vote to close the Facility.

10 a. Mission Creek as a Facility for the Developmentally Challenged

11 The Staff contends that Mission Creek is not a facility for the developmentally  
12 challenged; that Mission Creek is a facility that houses "criminally convicted juveniles." The  
13 reality is not as black and white as the Staff contends. Many juvenile offenders are indeed  
14 developmentally challenged individuals, and there is substantial overlap between individuals that  
15 can be found at a facility like Mission Creek, and individuals that are developmentally  
16 challenged. Mission Creek can be characterized as a rehabilitative or developmental facility.  
17 Various Washington state statutes include Mission Creek in the definitions and lists of "schools".  
18 RCW section 72.05.010 refers to Mission Creek Youth Camp as one of several named  
19 "residential state schools, camps and centers" with the purpose of providing "for every child with  
20 behavior problems, mentally physically handicapped persons, and hearing and visually impaired  
21 children. . . ." RCW § 72.05.010. Similarly, RCW section 28A section 190.020, defining the  
22 term "residential school," includes Mission Creek in the definition. RCW § 28A.190.020. Thus,  
23 the evidence shows that it is reasonable to characterize Mission Creek as a facility for the  
24 developmentally challenged, even though it houses "criminally convicted juveniles". The  
25 Statement must be evaluated in context, and with reference to its effect on the listener. An  
26 average 35<sup>th</sup> Legislative District voter would know that the facility referred to in the Statement is  
27 Mission Creek.

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1           b.       Senator Sheldon Voted to Close the Facility

2           The Staff additionally contends that a second component of Dr. Rickert's statement lacks  
3 veracity— that Senator Sheldon cannot be characterized as having voted to close the facility. As  
4 Dave Wood will attest to, and as detailed in several contemporaneous newspaper articles,  
5 Senator Sheldon's vote, and Senator Sheldon's inaction, essentially resulted in the closing of the  
6 facility. An April 12, 2002 Olympian article notes that **"the 35<sup>th</sup> district Democrats'**  
7 **chairwoman, Stacia Bilsland of Elma, now are blaming Sheldon for not saving the Mission**  
8 **Creek Youth Camp."** Sheldon Detractors Try New Track, Brad Shannon, The Olympian, April  
9 12, 2002 (emphasis added). Similarly, a June 22, 2002 Olympian article acknowledges that  
10 "Democrats [] say Sheldon's maverick ways cost him a chance to save Mission Creek Youth  
11 Camp from closure. . . ." Green Party to Take on Sheldon, Brad Shannon, The Olympian, June  
12 22, 2002. Senator Sheldon's vote was critical to the passage of the budget, and although Senator  
13 Sheldon voted against the passage of the budget, he could have used his vote to bargain for  
14 additional funding for the Facility. Washington state politicians widely engaged in this sort of  
15 bargaining. Consequently, Dr. Rickert's statement that Senator Sheldon voted to close the  
16 facility is not false. As described by Dave Wood, **"Tim's vote AGAINST his own party's**  
17 **budget sealed Mission Creek's fate."** See Nov. 6, 2002 e-mail from Dave Wood to Dr. Rickert  
18 (emphasis added). Finally, Dr. Rickert points out that the word "vote" can be used either in a  
19 broad sense—to refer to someone's general voting record over time—as well in a narrow sense, to  
20 describe someone's voting with respect to a particular issue in one particular instance. In this  
21 instance, Dr. Rickert used the word vote to describe Senator Sheldon's general voting habits.  
22 The evidence, including the belief of Senator Sheldon's peers, indicates that the Statement was  
23 not wrong in this regard.

24           3.       Materiality.

25           Finally, the Statement cannot reasonably be characterized as material. Senator Sheldon  
26 won the election by approximately a seventy eight (78%) percent margin. During the election,  
27 Senator Sheldon was undoubtedly aware of the Statement but made no effort to rebut it.  
28 Furthermore, a short time later, Senator Sheldon voted to close Firecrest School, a similar

1 facility. See Washington State Legislature Roll Calls on Senate Bill 5971 (accessible via  
2 [http://www.leg.wa.gov/pub/billinfo/2003-04/Senate/5950-5974\\_rollcall.txt](http://www.leg.wa.gov/pub/billinfo/2003-04/Senate/5950-5974_rollcall.txt)). Senator Sheldon's  
3 voting record with respect to facilities that house developmentally challenged individuals or  
4 juvenile offenders does not seem to affect his constituents' opinion of Senator Sheldon. Even if  
5 this were the case, his voting record on this issue does not seem to affect his performance vis a  
6 vis voters, who should be, and are, the ultimate arbiters of the veracity of statements made by  
7 political candidates.

### 8 CONCLUSION

9 In conclusion, the Staff fails to put forth sufficient evidence to allow a reasonable trier of  
10 fact to conclude that the Statement satisfies the elements of the Statute. The Statement (1) was  
11 not false, (2) not supported by "actual malice," and (3) not material. Dr. Rickert  
12 respectfully requests that the charge against her be dismissed in its entirety.

13  
14 Respectfully submitted this 22<sup>nd</sup> day of July, 2003.

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17 Newman & Newman, Attorneys At Law, LLP

18 By: 

19 Venkat Balasubramani (WSBA No. 28269)  
20 Counsel for Respondent Dr. Marilou Rickert

21 On behalf of the ACLU of Washington  
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